

THE  
LAW of ENGLAND:  
Or, A True  
GUIDE  
For all Persons concerned  
IN  
Ecclesiastical Courts.

- I. As to Persons not frequenting  
their Parish-Church, &c.
- II. As relating to Premunire, &c.
- III. As relating to the Oaths of Su-  
premacy and Allegiance, &c.
- IV. To the Case of Tythes, and duty  
of Church-Wardens, &c.

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By *H. Cary.*

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L O N D O N  
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*The Law of England;  
 or a true GUIDE.*

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CHAP. I.

What is to be done by  
 Persons cited into Ec-  
 clesiastick Courts.

**T**he King by (1) Law  
 is the Supreme  
 head of the English  
 Church, and he onely  
 originally hath all spi-  
 ritual Authority & Ju-  
 risdiction; for all Arch-  
 bishops, Bishops & o-  
 ther Ecclesiastical per-  
 sons, have no manner  
 of

(1) Stat. 26  
 H. 8. c. 1.  
 37 H. 8. c.  
 17. 1 Eliz.  
 c. 1. 8 Eli.  
 c. 1. See  
 Cawdries  
 Case, in 4  
 Cook Rep.  
 Henflows  
 case 9 Rep.  
 and the  
 Can made  
 An. 1602.  
 Can. 1, 2.

of Power or Jurisdiction, but by, from, and under him. See this fully proved, asserted and acknowledged both by acts of Parliament, Judges Resolutions, and the very Cannons themselves, in the places quoted in the margin.

Wherefore when you are cited into any Spiritual Court, the best way is to appear, and demand of them by what, and whose authority they keep such a Court. Whether they have any Patent from the King for the same; if they say they have, ask

(3)

ask whether it be under his Great Seal or no, and desire they would shew it you; for ubi vides, ibi fides, seeing is believing: So in the old Law-book, called Mirror of Justices, (a great part whereof is said to have been written before the Conquest) you may see this set down as an exception to the power of the Judge, (2) Sir, I demand the sight and hearing of the Commission whereby you claim Jurisdiction over me: and afterwards in the same section he saith, That a Judges Commission

(1) Chap  
3 Sect. 6.

A 5

may

(4)

may be appealed from,  
or excepted unto, for  
that it gives not cogni-  
zance of the cause for  
which one is brought  
into judgement, or for  
that it is vicious in it  
self, as being counter-  
feit or not sealed with  
the Kings Great Seal,  
&c.

And three Causes or  
Reasons there are  
which oblige you to  
enquize after these  
things.

1. For your owne safe-  
ty, lest you should ig-  
norantly contribute, and  
become accessory un-  
to the maintaining a  
forraign or usurped  
power,

(5)

power and so incur the  
grievous penalty of a  
Pernunire, of which  
we must speak by and  
by. (3)

(1) Vide in  
Chap. 7.

2dly, In point of  
Loyalty to the King;  
for if their proceedings  
are not by his Authori-  
ty, they are undoubted-  
ly against it.

3dly, Because you are  
thereunto obliged by  
the Oath of (4) Su-  
premacy ( if you have  
ever taken it ) for there-  
by you swear you do  
utterly renounce all  
foreign Jurisdictions,  
&c. and that you will  
defend all Priviledges  
belonging or annexed  
to,

(1) Ap-  
pointed by  
the Statute  
of 1 Eliz.  
cap. 1.

(6)

to the Imperial Croon  
of this Realm of which  
Ecclesiastical Jurisdic-  
tion is one as appears  
before. But how I  
pray can you come to  
know, That the pre-  
sent Bishops Courts  
are not foreign Ju-  
risdictions; and that  
they do not still hold  
them (as formerly  
(5) they did) by vertue  
of the Popes, or I  
know not what other  
like Authority from  
the See of Rome (which  
by the said Oath of  
Supremacy you have  
so solemnly renoun-  
ced) unless they pro-  
duce something to you  
to

(5) See  
Stat 25 H.  
8, cap. 10.

to manifest the contra-  
 ry: And how dare you  
 submit to their preten-  
 ded Jurisdictions, or  
 own their proceed-  
 ings till you know  
 that the same are by his  
 Majesties Command,  
 Appointment and Au-  
 thority? And how shall  
 you know that, till they  
 make it appear to you  
 to be so? For (6) *De non*  
*apparentibus, & non ex-*  
*istentibus eadem est Ra-*  
*tio,* Those things which  
 do not appear, are look-  
 ed upon in Law not to  
 be at all; and these  
 Lordships *Ipsi dixerunt;*  
 or bare say=soes should  
 methinks be scarce sa-  
 tis=

(6) Cook.

tisfactory in such cases.

Wherefore when they have cited you before them, and you have appeared, if they will not (upon your demand) shew you by what Authority they do these things, and who gave them that Authority, you may protest against all their proceedings as contrary to his Majesties Lawes and Prerogative, which you may tell them you are bound to assert and maintain, and so leave them, and go your ways home; or else (if upon

con=

consulting Councel  
 learned, and Proctors  
 in that behalf, you find  
 it feasible to be done )  
 you may put in some  
 formal Plea against  
 their Authority and  
 Jurisdiction ; and if  
 they will not allow it,  
 move in the Kings  
 Bench or Common=  
 Pleas for a Prohibiti=  
 on, &c. and if they can  
 produce no Authority  
 from his Majesty, and  
 yet will proceed and  
 excommunicate you, it  
 is void, you may either  
 indict them in a Pre=  
 munire, or bring an A=  
 ction upon the Case a=  
 gainst them, as Coun=  
 cel.

cel shall advise.

I told you before,  
That it was your best  
way to appear when  
you are cited, and now  
Ile tell you my reason  
for it, which is this, Be-  
sides the advantage  
you may gain, and the  
trouble and vexation  
you put them to, by  
quarrelling at there  
Authority and Jurisdic-  
tion, you will thereby  
prevent them from ex-  
communicating you for  
a contempt in not ap-  
pearing, which if you  
do not appear, they will  
be sure to do.

CHAP.

## CHAP. II.

## Of Citations.

**A** Citation is the Original Process, whereby a man is called into the Spiritual Court. It is served by a Sumner or Apparitor, and (1) ought to be under the Hand and Seal of the Chancelor, Commissary, ArchDeacon or other competent Judge of that Court from whence it issues.

By a Statute made 2 Edw. 6. cap. 1. it was enacted, That all Citations

(1) See Stat. 1 Ed. 6 cap. 2. & the Canons made An. 1640. Can. 17. both which though now out of force, may yet shew how Citations ought to be.

tions and Ecclesiastick  
 Process should be in  
 the Kings Name; but  
 this was speedily re-  
 pealed by 1 Mary cap. 2.  
 and though that act of  
 Repeal was also re-  
 pealed by 4 Jacob. cap.  
 25. yet the aforesaid  
 Stat. of Edw. 6. being  
 not in the said last Act  
 of Repeal expressly re-  
 vived, is thought not  
 to be now in force; so  
 that a citation in the  
 Bishops own Name,  
 may at this day be good  
 in Law; though I con-  
 fess I see not a Dram of  
 Reason why the Spi-  
 ritual Courts should  
 not make their Pro-  
 cess

cells in the Kings name,  
 as well as the temporal  
 Courts, since those as  
 well as these are the  
 Kings, and must if they  
 have any Authority at  
 all, Derive it from him;  
 and methinks their  
 contrary practise smells  
 strongly of the old Ec-  
 clesiastick insolency,  
 which alwayes endea-  
 voured to prefer the u-  
 surpation of the Biter  
 before the Jurisdiction  
 of the Crown.

There was a scurvy  
 custome formerly, to  
 grant general Citati-  
 ons to Apparitors to  
 cite all those whose  
 Names they should  
 there=

therewith receive; and so the Doctors put in whose names they pleased: But this is altered by a (2) Cannon purposely made against it, whereby it is ordered, That no such general Processes shall be sent out, except the names of those that are to be cited, be first expressly entered by the hand of the Register under the said Processes, and subscribed unto by the Judge or his Deputy, and his Seal thereto affixed.

(2) Vide  
Book of  
Cannons  
made An.  
1603. Can  
120,

Fitzherbert in his *Natura Brevium*, (3) saith,  
That general Citations  
(1) Fol. 99. of the Eng. Of the French, f. 41.

ons whereby men are cited to appear pro salute Animæ, (for their souls health) without expressing any particular cause, are against Law, and that the party so cited may sue a Prohibition thereupon to the Bishop or other Judge from whom it issues.

Note, That if a Sumner or Apparitor return a man cited into any Spiritual Court, when in truth he was never cited, and thereby the man comes to be excommunicated for a supposed contempt in not appearing, an Action

on of the case lies a-  
gainst the Sumner or  
Apparitor for such his  
false return; for here is  
Damnum & injuria, and  
though the Oath and  
proceeding be ecclesia-  
stical, yet the damages  
are temporal, Mich. 12.  
Jac. Cook. 12. Part. 128.

If an Apparitor will  
falsely and maliciously  
cite a Man of his own  
head for a pretended  
Crime, whereas in  
truth there was never  
any such crime so com-  
mitted, nor any com-  
mon fame or colour of  
suspicion against the  
party to induce him so  
to do, the party having  
put

purged himself of the objected crime in the Spiritual Court, may bring an action of the case against the Apparitor for such vexatious Citation, Hill. 7. Caroli, B. R. Rott. 1147. Carlion and Hills Case, Cro. 1. Part. 112. See Pasch. 10 Jac. Rot. 628. B. R. Powell and Godfrys Case, Cro. 2. Part 251. And Weald and Pease Case, Ibidem 355. acc.

## CHAP. III.

Of those that are cited  
out of the Diocesse  
wherein they inhabit,  
into the Courts of For-  
raign Diocesses

This Stat.  
was repea-  
led by Qu.  
M. but re-  
vived by 1  
Eliz. and  
is still in  
force.

**B**y the Statute of  
23. H. 8. cap. 9 it is  
enacted, That no per-  
son shall be cited to ap-  
pear before any spiri-  
tual Judge out of the  
Diocess or peculiar  
Jurisdiction where he  
is inhabiting and dwel-  
ling at the time of the  
awarding the citation,  
unless in these cases  
following.

1. For

1. For an offence that is committed in that Foreign Diocess where he shall be so cited.

2. In cases of Appeals, or where the Bishop or Judge of the peculiar Diocess is a party.

3. In cases where the Arch-bishops cite men concerning Probates of Testaments.

4thly. Or lastly, In cases where the inferior Diocesan doth request or give leave to the Arch-bishops to cite men before them, and that only where such request or license is allowed

lowed by the Civil or  
 Cannon Law (whether  
 whether it be at all or  
 no, is a question.)

In any of these four  
 cases, one may be cited  
 out of the Diocess, but  
 in any other cases, the  
 Arch-bishop, Bishop,  
 Commissary, Official  
 or Substitute, that  
 causes any man to be  
 cited out of the Diocess  
 or peculiar Jurisdicti-  
 on where he inhabits,  
 shall forfeit to him Dou-  
 ble damages and costs,  
 which he may recover  
 by Action of Debt, or  
 on the Case in any of  
 the Kings Courts, and  
 also shall forfeit for ever

ry person so cited, 10 l.  
one half to the King, &  
the other to him that  
will sue for it.

And on this statute  
you may have a Prohi-  
bition, as was resol-  
ved in Jones and James  
case. M. C. B. Trin. 15.  
Jac. Hob. 185.

And indeed this sta-  
tute is only an affir-  
mation of the ancient  
Common Law; for it  
was so long before, as  
appears evidently by  
8 H. 6. & 2 H. 4. Where  
'tis said, that if one be  
excommunicated in a  
Forreign Diocess, the  
same is Coram non Judi-  
ce, and so by necessary

consequence void. Tri.  
10. Jac. in C. B. Frances  
and Powels case, God-  
bolt 191.

(1) See  
Canons  
made An.  
150. Can.  
493.

So the Convocation  
have made a (1) Can-  
non, That no Dean of  
the Arches, nor Offici-  
al of the Arch-bishops  
Consistory, nor any  
Judge of the Audience  
shall cite, or procure a-  
ny to be cited that in-  
habit out of the Arch-  
bishops particular Dio-  
ceses, or peculiar, with-  
out license first obtain-  
ed of the inferior Dio-  
cesan, according to the  
said recited Statute of  
23 H. 8. on pain of be-  
ing suspended from  
their

their office three whole months.

Note here Reader,  
That the Arch-bishop  
of Canterbury hath a  
peculiar Jurisdiction in  
thirteen Parishes in  
London, which they are  
by name, I cannot tell,  
only that called S. Ma-  
ry of Bow is one, as  
appears by Minshew,  
whose words in the Di-  
ctionary (Titu. Arches)  
are these; The Judge  
of the Arches is called  
Dean of the Arches, be-  
cause with that Offici-  
alty there is joyned a  
peculiar Jurisdiction  
of thirteen Parishes in  
London (which are ter-

*Minshew:*  
Vide also  
*Cowels In-*  
*terpreter.*

med a Deanary, being exempted from the authority of the Bishop of London, and belonging to the Arch-bishop of Canterbury) of which the Parish of Bow is one, and the chief, because the Court is there kept : so that those that live in any of these Parishes, must be cited into the Court of the Arches only, and not to the Bishop of Londons Courts, nor to any of the Archbishops other courts, for the words of the before-recited Statute are, That they shall not cite any man out of the Diocess or  
pecu=

peculiar Jurisdiction  
[Mark] wherein the  
Devels or inhabit

# CHAP. IV.

Of Libels, and what you  
must do if you cannot  
get Copies of them.

**A**fter the citation and appearance,  
the next thing is the  
Libel, which is the  
same that in the com-  
mon Law is called the  
Declaration, being the  
accusation or charge  
against the party, con-  
taining the cause of his  
being cited.

*Cowels In-  
terpreter,  
and Min-  
shew's Dict.  
Tit. Lib. 1.*

By the Statute of  
2 H. 5. c. 15. it is enacted,  
That a copy of the  
Libel shall be delivered  
presently to those that  
are cited.

And if upon your  
demand they will not  
give it you accordingly,  
you may have a Pro-  
hibition till they give  
it you, and besides, may  
bring an action against  
them upon this Sta-  
tute, Fitz Herberts Na-  
tura Brevium, f. 33.

And to that purpose  
see in the Register of  
Original Writs, f. 51.  
The form of a Writ  
called, Breve de copia  
Libelli deliberanda.

CHAP.

## CHAP. V.

Of Appeals, when, and  
to whom to be made.

**A**n Appeal is a *Ridleys*  
provocation to a *View, p. 13.*  
higher Judge, that he  
may hear the cause a  
new, and redress that  
which is adjudged a-  
miss in the inferiour  
Court, or as others de-  
fine it, (1) a removing (2) *Cowel*  
of a Cause from an in- *and Min-*  
feriour to a superiour *shew.*  
Judge.

By the Statute of  
24 H. 8. c. 17. it is ena-  
cted, That in suits be-  
gun before an Arch-  
Deacon or his Official,  
W<sup>5</sup> the:

the appeal shall be to the Bishop of the Diocess.

And in suits begun before the Bishop or his Commissary, you must appeale within fifteen days after sentence given to the Arch-Bishop of the Province; Ibidem.

And in suits begun before the Arch-Deacon of any Bishop, or his Commissary, you must appeal within fifteen days after sentence given, to the Court of Arches, or audience of the same Arch-bishop, or Bishop; and from the said court of Arches

or audience ; within fifteen days after sentence there given ; to the Arch-bishop of the Province. *Ibidem.*

And by 25 H. 8. c. 19. it is further enacted, That for lack of justice in the Arch-bishops courts, it shall be lawful to appeal to the King in Chancery ; whereupon a Commission shall be directed to certain persons definitively to determine the matter ; & from thence no appeal lies.

In a suit for subtraction of tyths or offerings, if the Defendant do appeal, the Ecclesiastical

Stat. 32 H.  
8. c. 7.

See Dyer f.  
209 the  
Presidents  
of Magda-  
len Col-  
ledge cases

real Judge shall forth-  
with adjudge him that  
so appeals, to pay the  
costs of suit therein be-  
fore expended by the  
other party, taking se-  
curity of him to repay  
the said costs, if the  
cause upon the appeal  
be given for him that  
appeals.

A man is sued or ci-  
ted ex officio, in the  
spiritual court, and ex-  
communicated, & upon  
a certificate into Chan-  
cery, a writ de Excom-  
municato Capiendo is  
made out to take him:  
now if after all this, the  
Official by his Letters  
certifie into Chancery  
that

that the party hath appealed from that sentence, he shall have a writ of Superedeas, commanding the Sheriff not to take him while the appeal is depending, and if he have taken him already, then to deliver him, &c. Fitz Herbert Natura Brevium English, fol. 156.

Or upon an appeal one may have a Scire facias to the Bishop, and party at whose suit he is excommunicated, to shew cause in Chancery why they should not cease to take him if they have not taken him already, or why they should.

should not deliver him to  
if he be taken, whilst in  
the said appeal is de-  
pending; and if there  
be no good cause shew-  
ed, the same will be or-  
dered accordingly. *Ibidem* fol. 157, 158.

## CHAP. V.

### Of Prohibitions and Consultations.

See *Min-  
sters Di-  
ctionary*,  
and *Cowels*  
*Interpreter*  
and *Terms*  
of the Law.  
*Ibidem*.

**A** Prohibition is a  
Writ which is  
directed to the Spirit-  
tual Court, or the par-  
ty suing there, and his  
counsel, or to all of  
them, forbidding them  
to

to proceed any further  
in a cause there depend-  
ing ; and it is most  
commonly obtained by  
suggesting that the said  
cause doth not apper-  
tain to the Spiritual  
Jurisdiction.

A Consultation is a *Ibidem.*  
Writ that lies where  
the spiritual court is  
so stopped by a Prohi-  
bition, and the Sug-  
gestion whereon the  
same Prohibition was  
granted, is found not  
to be true, then a Con-  
sultation goes forth,  
giving the Spiritual  
court leave to go on a-  
gain as if the Prohibi-  
tion had never been.

Prohibitions are of two sorts of Law, and of Fact: Vide Ridley's View of the Civil and Ecclesiastical Law, page 169.

1. Prohibitions of Law are those which are expressed by any statute, as by 1 Edw. 6. c. 12. all Ecclesiastick Judges are forbid to hold plea of any thing that is contrary to the Statutes of Westminster the second cap. 3 Articuli Cleri, Circumspecte Agatis, Silva Cedua, the Treatise de Regia Prohibitione, and the Statute of 1 Edw. 3. cap. 110.

As if a man be sued  
in the Spiritual Court  
for a chattel or debt, or  
lands or tenements, or  
for a trespass, then he  
shall have this Prohi-  
bition, Fitz Herbert Nat.  
Bre. f. 97, 98.

2. Prohibitions of  
fact have no express  
word or letter of Law  
or statute for them, as  
the other have, but are  
raised by arguments,  
and a kind of Equity,  
where the Ecclesiastick  
Judge will not admit  
some matter, which at  
common Law ought to  
be allowed, or doth  
something against the  
parties right, or a-  
gainst

gainst the Common  
Law.

As this man was  
presented in the Eccle-  
siastick court for work-  
ing on a holy-day, viz  
carrying hay on St  
John Baptists day in the  
time of Divine Ser-  
vice; the man prayed  
Prohibition to stay the  
suit, suggesting that  
this was a holy-day by  
Act of Parliament, &  
therefore it belonged to  
the Temporal court to  
examine whether the  
works were broken or no, and  
a Prohibition was  
granted accordingly in  
Wheelers Case, 111. Jac.  
in C. B.

111. Jac.

So

So a man was sued  
in the Spiritual court  
for incontinency, and  
the Judges there  
would have examined  
him on his Oath, whe-  
ther he did it not; a  
Prohibition was a-  
warded to stop them;  
for ( 1 ) Nemo tenetur  
seipsum prodere, vel ac-  
cusare. No man is bound  
to betray or accuse him-  
self, Cullier and Culliers  
Case, the first part of  
Crooks Reports.

( 1 ) Cook  
1. Part In-  
stit. Vide  
Hob. 84.  
Spendlow.

It seems these Pro-  
hibitions may be had  
out of any of the courts  
at Westminster; but  
where there is a suit in  
the Kings Bench, or  
Com-

Common Pleas, and  
 you are sued for the  
 same things also in the  
 Spiritual Court, you  
 must move for a Prohi-  
 bition in that Tempo-  
 ral Court where the  
 suit is depending, Fitz  
 Herbert Nat. Bre. t. 106.  
 And note, that in the  
 Kings Bench, by the  
 course of the Court, a  
 Prohibition shall never  
 be granted the last day  
 of the Term, nor ought  
 any motion to be then  
 made for one; but on a  
 motion made that day,  
 the Court will make a  
 Rule for staying pro-  
 ceedings till the next  
 Term, by the Justices.  
 Pasc.

Pasc. 1 Car. R. R. Lat. 7.

If the spiritual Judg  
refuse to receive and  
admit a Prohibition,  
you may have an At-  
tachment against him,  
Fitz Herbert Nat. Brev.  
fol. 98.

And if they cite or  
excommunicate you for  
bringing a Prohibiti-  
on, you may thereupon  
have a new Prohibiti-  
on and an Attachment,  
and tis not in that case  
material whether the  
first Prohibition were  
sued legally or erron-  
ously, because no man  
shall be punished for  
suing a Prohibition in  
the Kings Court, Ibi-  
dem

dem, fol. 101. & 103.

**See** where one recovered 10000l. Damages against a Bishop for excommunicating him after a prohibition delibered, 20 Edw. 3.

Rott. 46. in the Treasury Tref. Case, 32 Ed. 3. Rott. 78. Sir Tho. Seatons Case.

**See** also 37 Edw. 3.

**Forty Pounds** costs were recovered against the Bishop of Canterbury, because he excommunicated one for executing the Kings writ for removing a force, Cook 12. Part 20.

**By** the statute of 50 Edw. 3. cap. 4. if one sue forth a prohibition,

and

and his suggestion being over-ruled, a Consultation is granted, he shall not afterwards have another Prohibition, unless the matter of the Libel be changed or enlarged. See Fitz. Herberts Natura Brevium, fol. 110.

But if the Consultation be wrongfully or unduly obtained, a new Prohibition lies, Trin. 11. Jac. in Com. B. See also Seranham and Metcalley's Case, 90 Bliz. and Sibley and Cawley's Case, the first part of Crooks Reports.

By the Statute of 2<sup>d</sup> and 3<sup>d</sup> of Edw. 6. c. 13.

it is enacted, That in  
 suits in the Spiritual  
 courts for Tythes, be  
 fore the Defendant shall  
 have a Prohibition, he  
 must deliver to some  
 of the Judges of the  
 Court where he moves  
 for the same, a true Co-  
 py of the Libel, and the  
 suggestion, wherein he  
 prays the Prohibition  
 subscribed; and if he do  
 not prove that sugges-  
 tion to be true by  
 two Witnesses, within  
 six Months, a Consul-  
 tation shall be granted,  
 and the party suing  
 forth the Prohibition,  
 shall pay double costs  
 and Damages to the  
 Plain

Plaintiff in the Spiritual Court for his trouble and delay thereby.

But note, This is only in suits for tythes, and it seems it is not usual in other cases to assess costs or damages upon the awarding a Consultation; for Doctor Ridley (2) complains of it, and says, the Temporal Judges forbear to do it, because they would not deter men from suing out, and pursuing Prohibitions.

One was presented ex officio, for not frequenting of his Parish church, the church of A;  
 C he

(2) In his view of the Civil and Ecclesiastical Laws.

he pleads that A. was not his parish Church, but that he had used to frequent another Church; and because the Spiritual Court would not receive that Plea, he moved in the Kings Bench for a prohibition; and it was the opinion of the whole Court, that the Ecclesiastical Court hath not power to intermeddle with the precincts of any parish Churches, nor are they to judge which shall be said to be a mans parish Church; wherefore a prohibition was granted, Trin. 9. Jac. in B.R.

Bolst.

Bolst. 1. Part. 159.

So in a suit in the Ecclesiastick Court for Tythes, in the Parish of A. the Defendant said they were in the Parish of B. and there-upon came and prayed a Prohibition in the Kings Bench, the question was, whether this issue, if in such a Parish or in such a parish, were tryable by the Law of the Land, or by the Law of the Church; and the court held, that the same is tryable by the Common Law: A Prohibition was awarded, Trin. 28. Eliz.

Stranlam and Colling-

rons Case, Leonards 2.  
Part.

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CHAP. VII.

Of Premunires.

*Termes de  
la ley Cow-  
els Interp.  
Minshews  
Diction.*

**A** Premunire is the name of a writ, and also of the offence it self, whereupon that writ is granted, which offence is this, where a man having, or pretending cause of Suit against another, which might and ought to be decided in the Kings Courts at Common Law, doth not prosecute him there, but  
Draws

draws him ad alien, exam-  
men, to some other kind  
of tryal, whether it be  
into the court of Rome,  
or any Ecclesiastick  
Court within the  
Realmt.

The principal Sta-  
tutes ( amongst divers  
others ) against this  
offence, are the 27 Ed.  
3. cap. 1. and 16 Rich. 2.  
cap. 5. by which it is  
enacted to this effect,  
That if any man shall  
sue another out of the  
Realin for any thing  
that appertains to the  
Jurisdiction of the  
Kings temporal courts,  
or shall purchase or  
pursue, or cause to be

purchased or pursued in  
 the Court of Rome, or  
 elsewhere, any Pro-  
 cesses, Excommunications,  
 Instruments, or  
 other things whatsoe-  
 ver, which touch the  
 King against him, his  
 Crown and Royalty, or  
 his Realm; and those  
 that bring, or receive  
 them into the Realm  
 or execute them, their  
 maintainers, abettors,  
 fautors and counsel-  
 lors, shall be put out of  
 the Kings protection,  
 and forfeit to him their  
 lands, tenements, goods  
 and chattels, and their  
 bodies to be imprisoned  
 during his pleasure.

A President of a Premunire against the Bishop of Norwich.

There was a custom within the Town of Thetford in Norfolk, that all Ecclesiastical Causes should be determined before the Dean, who had there a peculiar Jurisdiction; And that if any man did draw another into plea before any other Ecclesiastical Judge, and the same were presented before the Mayor, he should forfeit 6 s. 8 d. It happened, that B. sued in the Bishops  
 G 4      Con=

Consistory, upon a Cause arising in that Town, which was presented before the Mayor, and so B. by the custom had forfeited 6 s. 8 d. Hereupon the Bishop cites the Mayor before him, and enjoinng him on pain of Excommunication to annul the Presentment: The Mayor prefers a Bill of Indictment in Premunire against the Bishop, in which case it was resolved, that the word (Elsewhere) in the before recited Statute of 26 Rich. 2. extends as well to the Courts of Bishops, and other Ecclesiastick

cleſſtick courts with-  
 in the Realm, as with-  
 out; and that whether  
 the aforeſaid cuſtom in  
 Thetford, and the Pre-  
 ſentment before the  
 Major were good or  
 not; yet this being a  
 temporal thing deter-  
 minable at Common  
 Law, and not examina-  
 ble in the Spiritual  
 Court, the Biſhop had  
 incurred a Premunire  
 by meddling with the  
 ſame, and accordingly  
 Judgment was given  
 againſt the Biſhop that  
 he ſhould be out of the  
 Kings protection, and  
 forfeit his lands goods  
 and chattels, and be

imprisoned during the  
Kings pleasure, Hill.  
25 H 8. the Bishop of  
Norwich's case, bouch-  
ed in Cook 12. Part. 41.  
in the case of a Premu-  
nire.

Another President.

A sets forth his tyth,  
and B a stranger comes  
afterwards, and car-  
ries them away; if the  
Parson libel against B  
for this in the Spirit-  
ual Court, both he and  
the Judge, and all that  
have a hand in it, incur  
a Premunire, for that  
he ought to have been  
sued for the same at  
Common

Common Law, to which the tryal thereof did properly belong, 17 H. 8. Spilmans Reports, in Turbevilles Case, Hill. 16. Jac. in C: B. Brownlow.

Hereby we see, that the encroachment of the Spiritual Courts upon the Temporal Jurisdiction, was the only crime which anciently was punishable by a Premunire: but now the same punishment is by several Statutes extended to Divers other offences.

As the maintaining the Authority of the See of Rome, and the re-

refusal to take the oath of Supremacy, are both punishable by Pzemunire by the statute of 5 Eliz. c. 1.

So is the aiding or maintaining any that sets forth the Authority of the See of Rome, after the offence, by the statute of 13 Eliz. c. 1.

Some there are, (as Sir Thomas (1) Smith, and after him, Doctor (2) Cowel, and Sir Thomas (3) Ridley) who stoutly contend, That at this day no Pzemunire can lye for suing for any thing whatsoever in the Ecclesiastick Courts; for (say they) all

(1) *De Rep. Angl.*  
l. 2. c. 11.

(2) In his  
Interpre-  
ter.

(3) In his  
view of  
the Civil  
and Can-  
non Law.

all the Statutes of  
 Premunire were made  
 when this realm groan-  
 ed under the Papal yoke,  
 to restrain the usur-  
 pation and encroach-  
 ment of the See of  
 Rome: But now the  
 Pope, and all his pre-  
 tended Authority be-  
 ing banisht out of the  
 Land, and all Ecclesi-  
 astick Jurisdiction best-  
 ed in the King, Cessante  
 Ratione, Cessat Lex;  
 The cause of those  
 Lawes being gone, the  
 lawes themselves ought  
 to cease. And besides  
 the offence mentioned  
 in the Writ of Premu-  
 nire (4) is, Contra Co-  
 ronam

(4) Old  
 Nat. B. c.  
 f. 151.

ronam & dignitatem Regis, against the Credit and Dignity of the King, which (say these men) the proceedings of the now Spiritual Courts cannot be, for they are by the Kings Authority, and what is done by his Authority, cannot possibly be said to be against it.

But saith the Oracle of our Law, the learned Lord Cook, (5) Argumentum ab Auctoritate fortissimum est in Lege, Book-cases are the best proofs of Law; and therefore to silence these mens Rhetorical flourishes by the

(4) On  
Littleton,  
page 141.

the irrefragable voice  
both of Authority and  
Reason, let them know  
that it was resolved by  
all the Justices, Term.

(6) Pasch. 4. Jac. in B. R.

That the Statutes of  
Preambure are still in  
force, and not repealed,  
nor obsolete; and that  
when any Ecclesiastick  
Judge doth usurp up-  
on the temporal Law,  
he doth offend against  
the Crown and Digni-  
ty of the King, for this  
reason, because he  
draws the cause which  
is determinable at the  
Common Law, to be  
decided by the Ecclesi-  
astick Law, and so de-  
prives

(6) See

Cook 21.

Part 5.

31. Case of  
Preambure.

(7) See  
Ed 6 l. 36.  
Cook pref.  
to 5th and  
6. Reports,  
and on  
Littleton,  
L. 2. 12.  
Sect. 313.

prizes the Subject of  
THE COMMON  
LAW, WHICH  
IS THE (7) BIRTH-  
RIGHT AND IN-  
HERITANCE OF E-  
VERY FREE-BORN  
ENGLISH MAN.

# CHAP. VIII.

Of Excommunication,  
and the proceedings a-  
gainst persons Excom-  
municated.

**E**Xcommunication is  
an Anathematiza-  
tion, cursing, or casting  
one out of the Church,  
or (as Panormitan de-  
fines it) a sentence pro-  
nounced.

nounced and inflicted by the spiritual Judge, depriving one of the participation of the Sacraments, and sometimes also of the communion of the faithful. See Minshews Dictionary.

This sentence anciently was so terrible, that it gave birth to that Axiome, (1) Excommunicatio five justa five injusta, est timenda; Excommunication, be it just or unjust, ought to be feared. But afterwards, when men began to give but small regard to the flashes of this spiritual Lightning, the Clergy who have

(1) Vide  
Summa  
Angelica  
Titulo  
Excom-  
municatio.

have always had a great hand in molding our Lawes) devised to make use of the thunder of the Secular Arm, and thereby render these their fulminations more formidable to the vulgar. Hereupon they introduced our cruel sanguinary Lawes for casting the bodies of those men into Prisons, Earthly Purgatories, whose Souls they had by Excommunication given to the Devil, & marked out for the bottomless pit; the manner of which proceedings are as follows.

After

After the Spiritu-  
al Iudg hath pronoun-  
ced a man excommuni-  
cated, he sends his Let-  
ters Denunciatoꝝ to  
the Parson or Vicar of  
the Parish where he is,  
or lately was inhabi-  
ting, commanding the  
said Parson or Vicar  
openly to denounce the  
sentence of Excommu-  
nication in the said Pa-  
rish Church, on some  
Sunday or Holy-day  
in the time of Divine  
Service.

Then if the party  
stand so excommunicat-  
ed forty days, the Bi-  
shop may certifie the  
same into the Chancery,

Stat. 5. E.  
12. c. 13.

ry, whereupon a writ  
(properly called a writ  
de Excommunicato Ca-  
piendo, but commonly  
a Significavit) is made  
out thence into the  
County where the par-  
ty is, or lately was in-  
habiting, returnable in  
Term time, in the  
Kings bench, command-  
ing the Sheriff to take  
his body, which if he  
do, he must carry him  
to the Gaol, there to  
remain till he submit  
to the Church, and will  
be absolved.

*Ibidem.*

But if the Sheriff  
return a Non est inven-  
tus (that is, that he can-  
not find him) then a  
Writ

Writ (called a Capias) issues out of the Kings Bench, which must be returnable two months at least after the test or date; and by vertue of this Writ the Sheriff (ten Days at least before the return of it) must either at the County Court, Assizes or Sessions, make Proclamation, that the party yield his body to prison, there to remain as aforesaid, within six Days after such Proclamation, on pain of forfeiting 10 l.

After which Proclamation, and the six Days expired, the Sheriff returns Ibidem.

turns the said Capias, and certifies whether the party hath yielded his body or not; if he have not, he forfeits ten pounds; and thereupon another Capias goes forth with a like Proclamation on pain of forfeiting twenty pounds, and so Capias after Capias infinitely, and the party (not yielding himself) forfeits twenty pounds on every Capias.

Ibidem.

But if the party be taken on the *Uit de Excommunicato Capiendo*, or yield himself on any of the Proclamations of the Capias's, he must

must remain in Prison  
without Bail, Baston,  
(1) that is, leave to go  
abroad with a keeper  
or Mainprise, until he  
submit, &c.

(1) Cowels  
Interpre-  
ters.

## CHAP. IX.

Of the ways, means, and  
causes to overthrow,  
frustrate or avoid the  
Writ de Excommuni-  
cato Capiendo, and the  
Imprisonment there-  
upon.

**N**Or, the Bishop  
only must certi-  
fie Excommunication,  
and the reason why no  
other

other can do it, is because the Kings Court can write to no other to absolve him, Cook 8. Pag. 68, 69. Trollops Case; and his Certificate must recite that the party hath stood excommunicated forty Days at least before the date thereof, or else no Writ de Excommunicato Capiendo can be made out, Fitz Herbert Nat. Brev. fol. 156.

And if this Certificate be false in that particular, I know not why you may not bring and maintain an Action of the Case against the bishop for the same.

By the Statute of 5 Eliz. cap. 23. every writ de Excommunicato Capiendo, must be opened and delibered of Record in Court before the Justices of the Kings Bench, to the Sheriff or his Deputy who is to execute it.

And if the said Writ be not so delibered of Record, it is error, and the party taken upon it may bring himself up by Habeas Corpus, and he shall be discharged, as was resolved and done, Trin. 10. Car. in B. R. Parkers Case, Cro. 1. Part. 421. See also 11 Jac. in B. R. Cro. 2. Part 566. D fur

Further, by the same Statute the said Writ de Excommunicato Capiendo, is to be made out in Term time returnable next Term after, and is to contain twenty days at least between its test or date, and its return; And though we do not find any Presidents in this, as we do in the case before, yet since 'tis a received Maxim, Similium similis est Ratio, that of like things there is like Law; then certainly the omission of this will be error, as well as the not delivering it of Record: for  
the

the Statute is no less expresse and affirmative in commanding the one, than the other.

But how shall you know whether this writ be so delivered of Record to the Sheriff, or whether the same do contain twenty days between its test or return? You must search in the Crown Office for the same, and if the Clerks there shall refuse to tell you, (offering to pay them for the search) you may bring an Action, or move the Court against them, as you shall be advised for by Law and Reason

( which is Anima Legis, the life, substance, and quintessence of the Law ) all Records ought to be free and open for all men to search, and have recourse unto,

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## CHAP. X.

Of the forfeitures for not yielding ones self on the Proclamation of the Capias's, how the same are to be levied, and in what Cases nothing is forfeited.

**I** Told you in the last Chapter, that if the Sheriff

Sheriff return a Non Inventus on the Writ of Excommunicato Capiendo, a Capias shall go out, with a Proclamation for the party to yield himself, which if he do not, he forfeits 10 l. on every Capias afterwards, and this is by the before-mentioned statute of 5 Eliz. c. 23. But note, that by the same statute there are two cases in which though a man stands out never so many Proclamations yet he shall forfeit nothing, and they two are these.

First. Where the party against whom the

Tit de Excommunica  
to Capiendo is award-  
ed, hath not therein a  
sufficient and lawful  
Addition, that is (saith  
Cowel) a Title over  
and aboue his Chri-  
stian and Surname,  
shewing his State, de-  
gree, occupation, trade  
or mystery; as, Lord,  
Knight, Gentleman,  
Roman Clothier, and  
the like, and the Ham-  
let, Town, Parish and  
County where he is, or  
lately was conversant  
or dwelling.

Secondly, Where it  
is not expressed in the  
Bishops Certificate,  
That the cause for  
which

Which the party was originally cited into the Spiritual Court, was one of these ten causes following, (that is to say) Peresse, refusing to have Children baptized, refusing to receive the communion, refusing to come to Divine Service, error in Religion or Doctrine, Incontinency, Usury, Simony, Perjury in the Ecclesiastical Court, or Idolatry.

Then in both those cases, saith the aforesaid Statute, all and every the pains and forfeitures limited by this Statute against such

persons Excommunicate, by reason of such *Uxiz de Excommunicato Capiendo*; Wanting such addition, or of such Certificate, Wanting all the causes aforesmentioned, shall be utterly void in Law, and by way of plea to be allowed to the party grieved; which some expound, that the *Uxiz de Excommunicato Capiendo*, and the Certificate should in those cases be utterly void, and the party taken thereupon discharged; and indeed the words *prima facie* seem to favour such a construction.

But our Judges have adjudged the contrary, and resolved, that not the Writs, or the Imprisonment thereupon, but only the forfeitures for not coming in on the Proclamation, are by those words avoidable. *Hugh's Case, 2. Part of Crook.*

Now the course to make you pay these forfeitures, is this, when the Sheriff hath returned into the Kings Bench; that you have not yielded your self, then the Judges there estreat the forfeitures into the Chequer, and thence a Di-

stringas is made out against your Estate, which the Sheriff seizes and sells for the payment thereof.

Wherefore if your case happen to be either of the two cases aforesaid, so as by the statute you ought not to be made pay any of the said forfeitures, then you must (I conceive) when you hear the Sheriff hath such Distingas against you, before he hath seized on your goods, or at least before he hath sold them, render your self, and come in, and shew your case by way of plea in the  
Kings

Kings bench, and there  
they will reliefe you  
against the same.

This I suppose to be  
the course of proceed-  
ings in this particu-  
lar; for otherwise I see  
not how a man shall  
have Day in Court to  
shew his cause, unless  
we shall imagine that  
there must go out a Sci-  
re facias to shew cause  
before the Distringas; I  
cannot indeed offer you  
any thing for Law con-  
fidently in this case, for  
I have not seen nor  
heard of any president  
thereof, and I lobe  
not to vent my own  
thoughts or fancies  
for

for Law, lest I should  
 hereafter be forced Wi-  
 cere non putaram, which  
 ( as I learned out of  
 my honest Grammar )  
 insipientis est: However  
 if that be not the way,  
 there is ( you may build  
 on that ) some other  
 course to avoid the said  
 forfeitures in those ca-  
 ses, though as yet we  
 cannot positively tell  
 you what, or which the  
 same is; for in truth  
 there is scarce any Sub-  
 ject in our Law more  
 Dark, or less under-  
 stood than this concer-  
 ning Excommunicati-  
 ons, and its penalties:  
 partly: because most of  
 our

our Books speak of it, Aut nequicquam, aut nequaquam, either not at all, or nothing to the purpose; handling it as if it laboured with a Noli me tangere, or would prick their tender fingers: And partly, because the same was in the late times utterly out of use, and so by consequence never well understood by our Juniors, Doctors, and almost quite forgotten by those of more ancient standing.

CHAP.

## CHAP. XI.

Of the Writs de Excom-  
municatō Deliberando:  
& Cautione adhibenda.

**I**F after: all this, the  
party excommunic-  
ated make satisfaction  
to the Church, the Bi-  
shop must certify the  
same into Chancery,  
and thence shall issue  
out a Writ called, De  
Excommunicato Delibe-  
rando, commanding the  
Sheriff to deliver him  
out of prison, Fitz Her-  
berts Nat. Bre. Tit. Bre-  
ve de Excom. Capiend.

¶

¶ If the party be= Ibidem.  
 ing in prison, doth of-  
 fer to give surety to  
 obey the Church in  
 form of right, and the  
 Bishop refuse to take  
 the same, a Writ called  
*De cautione admittenda*,  
 may be had, command-  
 ing the Bishop to ac-  
 cept of such surety, and  
 get the man dischar-  
 ged; and if the Bishop  
 thereupon do not send  
 to the Sheriff to dis-  
 charge him according-  
 ly, then the party shall  
 have a Writ out of  
 Chancery, directed to  
 the Sheriff, command-  
 ing him to deliver him  
 out of prison without  
 any

any more ado : and upon this Writ. he may have an Alias, Pluries, and an Attachment against the Sheriff, but so he cannot against the Bishop.

*Ibidem.*  
*Titulo*  
*Superse-*  
*deas,*

And 'tis said, that these Writs may also be had (upon a petition to my Lord Chancellor) before the party is taken, in the nature of a Superse-deas commanding the Sheriff not to take him, or if he have taken him, to deliver him.

CHAP.

## CHAP. XII.

Of the effects of Excommunication, with divers observations worthy of remark.

**N**ote, that a person excommunicated cannot bring or maintain any action in his own right, but is thought as Executor or Administrator to another he may, for there he sues in the right of the party deceased. Take me in quare; because some say, that they who converse with a person excommunicated, are excom-

excommunicated also.  
Cook 1. Part Institutes  
134.

When Excommu-  
nication is pleaded to  
the Plaintiff, his Writ  
shall not abate; for if  
afterwards he pur-  
chase Letters of Absolu-  
tion, and shew them  
in Court, he may have a  
Re-summors, or Re-at-  
tachment upon his Or-  
iginal, according to  
the nature of his Writ.  
Old Nat. Bre. f. 37. Cook  
1. Part Instit. 133. and  
the entry is, Quod lo-  
quela removeat quous-  
que, &c. Cook 8. Part  
68, 69. Trollops Case.

If a man sue a Bishop, and he plead Excommunication by himself or his Commissary, (although it be for another cause than that in question) the same shall not disable the Plaintiff to go on with his suit, for the Bishop is a party, Ibidem.

Note, that a man excommunicated may have the surety of the peace granted to or against him, as another man, Crompt. 134. Dalton 164. So may a man attainted in a Premunire, Ibidem. But by the old Book, a man excommunicated ought not

not to serbe of a Jury,  
Cook Instit. 1. Part. 158.  
&c.

Note, that if excomm-  
munication be pleaded,  
it must be under Seal  
resolved, Hill. 44. Eliz.  
in B.R. Sonham & Trun-  
dles Case, Crook 3. Part  
919. See Pasch 4. Car.  
in B.R. Viner and Eatons  
Case, Hetly 86. aec.

Note, If one Bishop  
certifie Excommenge-  
ment made by another  
Bishop, the same is  
void: so also if the Bi-  
shop be dead before the  
certificate be shewed, it  
is void, and signifies  
nothing, Old Nat. Bre.  
f. 36.

Note,

**Note.** That the Bishops Certificate must recite not only the cause for which the party is excommunicated, but also that for which he was first cited into the Spiritual Court; that so the temporal Judges may know whether the matter did originally appertain to the Spiritual Jurisdiction.

**Note,** If a man render his body on a Proclamation of any of the Capias's, and yet the Sheriff will return that he hath not, whereby the mans goods comes to be distrained for a supposed forfeiture

ture for not rendering himself, whereas in truth he hath done it, the Sheriff for such false return, forfeits forty pounds to the party grieved, by Stat. 5 Eliz. cap. 23.

Note, That they of the Spiritual court, of themselves have not power to meddle with the person of any man, nor to send process to bring any mans body before them, but ought to certify into Chancery, and thence have a writ, &c. nor can the Sheriff or any other by vertue of any Writ de Excommunicato Capiendo,

do, break open any  
 man's house, See Smith  
 and Smith's Case, Hill.  
 Eliz. in C. B. Crook  
 Part 741.

Note, That it was  
 resolved by the Justices,  
 That if a man be  
 excommunicated by the  
 Ordinary, where he  
 ought not to be, and by  
 negligence doth not sue  
 Prohibition, but re-  
 mains excommunicated  
 forty days, and up-  
 on a Certificate into  
 Chancery he is taken  
 upon an Excommunica-  
 tiō Capiendo, he may  
 have a Writ command-  
 ing the Bishop to ab-  
 solve him; and also,  
 that

that when a man is ex-  
 communicated against  
 the Law of the Realm  
 so as he cannot have  
 Cautione Admittenda  
 for then he ought to  
 obey the commands of  
 the Church in form of  
 Law, (that is to say) of  
 the Ecclesiastick Law  
 whereas the same is  
 against the form of the  
 Law (that is to say) of  
 the Common Law: In  
 this case, if he shew his  
 case to the Bishop, and  
 request him to absolve  
 him, and he refuse to  
 Action upon the case  
 eth against the Bishop  
 for such refusal, Mich.  
 8. Jac. Cook. 12. Part 7.

## CHAP. XIII.

Of Ex Officio, and other  
Oaths.

**F**or a Corollary to  
this Discourse, I  
think it will not be a-  
miss to add a word or  
two concerning Oaths,  
and first of the definiti-  
on of an Oath in gene-  
ral.

An Oath saith Cook  
(the 3d part. Instit. c. 74.  
pag. 165.) is an affirma-  
tion or Denial by any  
Christian, of any thing  
lawful and honest be-  
fore one or more that  
have

have Authority to give the same for advancing of truth and right, calling Almighty God to witness that this Testimony is true.

And further he saith, no oath ought to be administered but such as is allowed by the Common Law, or by Act of Parliament : neither can any Oath be altered that is so allowed, unless it be by Parliament : nor ought any to administer any Oath but such as are thereto authorized by Act of Parliament ; and therefore all statutes that set forth

forth any Oath, do also  
 give some body power  
 to administer the same.

Wherefore when you  
 are at any time requi-  
 red to take any Oath,  
 you must enquire two  
 things; first, By what  
 law such oaths as they  
 require you to take, is  
 prescribed and war-  
 ranted. Secondly,  
 Whether those that  
 tender the same, have  
 power to administer it.

And note, that all Ex  
 Officio Oaths, or oaths  
 to accuse your self of  
 any crime, or to answer  
 all such questions as  
 shall be demanded of

you &c. are against  
 Law, and ought not to  
 be taken by any. So it  
 was resolved by the  
 Justices, that the Or-  
 dinary or Bishop can-  
 not constrain any to  
 swear to answer such  
 Articles and Interroga-  
 tories as shall be admi-  
 nistred unto him, but  
 they ought to deliver  
 the Articles to him up-  
 on which he is to be ex-  
 amined, to the intent  
 that he may know whe-  
 ther he ought to an-  
 swer unto them. Se-  
 condly, That no man  
 ought to be examined  
 upon secret thoughts  
 of

of his heart, but something must have been done or spoken by him, on which he is to be examined, and if they shall go about to examine in such cases *ex officio*, a prohibition lies. See Cook 12. part. 26. Bolst. 26. Trim. 10. Eliz. Leighs Case there vouched; and M. 19 Eliz. Dyer, Hynds Case, who because he would not swear before the Ecclesiastical Commission on Articles for Usury, was committed by them to the Fleet, but was delivered upon a Habeas Corpus per Ceriam.

'Tis a Rule & Maxim  
in Law, Nemo de-  
bet seipsum prodere, Ne-  
mo tenetur accusare seip-  
sum, No man ought, or  
is bound to betray or  
accuse himself; such  
unnatural proceedings  
were to make him a  
kind of Folo de se, and  
as it were, accessory to  
his own ruine; there-  
fore at the Common  
Law in tryal of Chal-  
lenges, if the cause of  
Challenge touch the  
dishonor or discredit of  
his Juror, he shall not  
be examined on his oath  
concerning the same;  
Cook. Institutes part. 1.  
158. b. 1. And

And so if the Ecclesiastical Court will enjoin a man to be examined on his Oath for discovery of any co-  
 vin, fraud, or other crime, a Prohibition lies, Hob. 84. Bendlow, Wingates Max. pa. 487.

And indeed the Petition of Right made Anno tertio Caroli primi, condemnes all such oaths and Inquisition-like proceedings, as not at all warrantable by the Lawes and Statutes of the Realm, and expressly enacts, That no man hereafter shall be called to take such

C 4.      oath,

Oath, or give attendance, or be confined, or otherwise molested or disquieted concerning the same, or for refusal thereof.

The onely persons authorized to administer the Oath of Allegiance, are; the Bishop in his own Diocess, two Justices of Peace, whereof one of the Quorum, within the limits of their Jurisdictions, and the Judges or Justices at the Assizes or Sessions, Stat. 3. Jac. cap. 4.

The Oath of Supremacy was never to be

be required of common persons, but onely of such as had some Office or place of trust: See Stat. 1. Eliz. cap. 1. and 5 Eliz. cap. 1. But now the said Oath is not required of any at all, it being suspended by a Proclamation of His most Majesty, soon after his happy Restauration.

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## CHAP. XIV.

## Of Tythes.

**W**E shall not  
spend time in  
disputing the old Que-  
stion, whether Tythes  
be due Jure Divino, of  
Divine Right or no:  
For though formerly  
there have been many  
a quarrel about it, yet  
we perceive most  
Priests themselves do  
now begin to grow  
weary of that broken  
Reed, and fly from  
thence

thence to the stronger  
 refuge of humane con-  
 stitution, or positive  
 Law.

And here as to that  
 we may tell you, That  
 all exaction of Tythes  
 is against Magna Char-  
 ta, and the fundamen-  
 tal Law of the Land;  
 for we conceive it will  
 be no difficult matter  
 to make it appear be-  
 yond all doubt or Deni-  
 al, that all the time of  
 the Confirmation of  
 Magna Charta, Ecclesi-  
 astical persons had no  
 legal remedy by force  
 to recover their tythes;  
 nor was there any set-  
 led

ted Parochial Right,  
 but the People did ar-  
 bitrarily bestow them,  
 where, and to whom  
 they pleased. See lear-  
 ned Seldens History of  
 Tythes, p 291. 252. 144.  
 146. And who can pro-  
 duce a Cannon of any  
 General Council be-  
 fore that of Lateran,  
 held about Anno 1216.  
 which either purpose-  
 ly commanded payment  
 of Tythes, or expres-  
 ly supposed them a du-  
 ty of Common Right.  
 See Seldens History,  
 137. and the Roll of  
 Winton called: Doom-  
 day Book.

Since

Since therefore ex-  
 action of Tythes was  
 not practised at the  
 time of the confirmati-  
 on of Magna Charta,  
 (which by an act made  
 25 Edw. I. is adjudged  
 and declared to be the  
 Common Law of the  
 Land) and for that it  
 is enacted by Magna  
 Charta, cap. 29. That no  
 man shall be disseised or  
 put out of his Free tene-  
 ment, Liberties or Cu-  
 stoms, but by the lawful  
 Judgment of his Peers,  
 or Law of the Land :  
 Therefore Tythes (be-  
 ing a part of every  
 mans

man's free Tenement  
or free-hold & Birth-  
right) ought not to be  
taken from him.

And if they shall talk  
of statutes made since  
for Tythes; the An-  
swer is ready, that all  
such Statutes being  
against Magna Charta,  
were destroyed before  
they were born by the  
Statute of 42 Edw. 3.  
cap. 1. which enacts,  
That if any Statutes  
should from thence-  
forth be made against  
Magna Charta, the same  
should be void; and be-  
sides, such statutes for  
Tythes, being against  
Com-

Common Right and Reason, and the Law of the Land, which is *Re-cta ratio*, they are lifted as soon as ever they creep into the world; for so it was adjudged in Bonhams Case, 8. p. of Cooks Reports, That Acts against Common Right or Reason, are *ipso facto*, void; where- with agreeth Doctor and Student, cap. 4. p. 8. where he saith, That the Law of Princes, the Commandments of Prelates, the Statutes of Commonalties, nor yet the Ordinances of the Church, are not  
right

righteous nor obligatorie or binding, except they be consonant and agreeable to the Law of God; and cap. 2. p. 4. Against the Law of Reason neither Prescription, Statute nor Custom may avail, for if any be brought in against it, they be void.

Or secondly. If they speak of custome for their Tythes, we could as easily answer them thereto, in the words of *la* (1) Father, Custom without truth is but Erroris vetustas, an old error; or with the Law

(1) Ciprian.

Law, Maxim, Malus u-  
 sus est abolendus, Bad  
 Customes must be abo-  
 lished. Or, in the  
 words of Cook, non diu-  
 turnitas temporis, sed so-  
 liditas rationis considran-  
 da est, Not the length  
 of time, but the strength  
 of reason is to be consi-  
 dered; but what rea-  
 son pray is there in  
 this irrational ridicu-  
 lous Logick; Parochi-  
 al Priests have befool-  
 ed their Parishioners  
 of the tenth part of  
 their free tenement or  
 substance almost ever  
 since the Council of  
 Lateran; Ergo they must  
 do

Do so still in sæcula sæcu-  
lorum; for evermore.

This, I say, and  
much more to the same  
tune (which would  
make a noise, and drum  
rarely in popular ears  
and empty heads, that  
are to be let unfurnish-  
ed) we could alledge,  
but to as little purpose  
as if we were reciting  
some of Plato's Laws,  
or telling you the fan-  
cied Statutes of Uto-  
pia; for admit it were  
anciently de Facto, and  
be still de Jure Funda-  
mentali, our right to be  
free from Tythes, or at  
least

least to bestow them  
 how we please: yet a-  
 las! when shall we en-  
 joy this Right? We  
 may not do amiss to  
 hope and wish for it,  
 but I see small reason  
 we have to look for, or  
 expect it: Wherefore  
 leaving Idea's, let us  
 come to that which is  
 practicable and done e-  
 very day, and acquaint  
 you with something  
 concerning Tythes;  
 which you may confi-  
 dently challenge as  
 your right, and no bo-  
 dy deny it you: And  
 first, Of what things  
 Tythes are not to be  
 paid.

I, &c.

1. Generally, Tythes are not to be paid of Houses, or of any Rent reserved on any Demise of them, unless there be some Statute or Prescription for the same, Cook. 20. part. 16. **Dr. Graunts Case.** See **Dr. Layfields Case**, where tis said, That no tythes are paid for Houses in any Cities or Towns in England, save in London, where by a Decree made 37 H. 8. cap. 12. each house is to pay 2 s. 9 d. Tythe for every pound Rent; but that Decree was never enrolled, nor had any

(III)

any subsequent confir-  
mation, and therefore  
is verily thought to be  
not at all in force or ob-  
ligatory.

2. For Personal  
Tythes, that is, for the  
profit made by Crafts,  
Labor and Trades, it  
is provided by a Sta-  
tute of 2 Edw. 6. cap. 13.  
That all such as use  
trading or handicrafts  
(except common La-  
bourers) shall pay  
their tythes as they  
were used to be paid  
forty years before that  
Statute, and as of  
right they ought to be  
paid:

paid: And for this, in most places, the Parishioners use about Easter to pay a small matter to the Parson or Vicar, according to the custom of the place; for without a custom for it, nothing ought to be paid for personal tithes, by three Justices in C. B. 17 Jac.

3. Quarries of Stone, gravel, sand, clay, &c. are not tithable, Reg. ster 55. Fitz Herbert Nat. Bre. 53. no more are not coals, 20 Eliz. by all the Justices; the reason is, because tithes is paid

paid otherwise of the Land of which these things are parcel; and 'tis a rule, tythes ought never to be paid of one thing twice.

4. Mills, Jure Communi, ought not to pay tythes: but if they be of new erection, they must by the Statute 9 Edw. 2. c. 5.

5. Feræ Naturæ are not tythable, 12 H. 8. 4. by all the Justices: Query therefore, whether tythes are to be paid of Coneyes: It seems no, unless it be by

by a particular Custom,  
15 Car. in B. R. by Berk-  
ly Justice.

6. Of Trees of  
twenty years growth  
that are timber, no  
tythe shall be paid, by  
the Statute 45 Edw. 4.  
c. 3. but of Willows,  
Maples or such trees,  
that are not timber,  
though they be of a-  
bove twenty years  
growth, tyths shall be  
paid: and if they be  
sold standing, the buy-  
er, not the seller must  
answer the tythe: but  
if sold after it is cut  
down, contra.

7. Tythe

7. Tythe shall not  
 be paid for rowings,  
 or after pasture, 6. Jac.  
 in C. B. Nor of the  
 Beast of the plough or  
 pail, or belonging to  
 Husbandry, but if a  
 man keep Cattel till  
 they be ready for the  
 pail, and then sell them,  
 he must pay tythe, Mic.  
 8. Car. B. R. Baxter and  
 Hopes Case, Brownlows  
 adpart.

8. Tythes shall not  
 be paid of the blood  
 though much that is  
 sent by the owner of  
 himself in his own  
 house,

house, by Hobart Chief Justice, Mich. 15. Jac. in C. B. White and Bickerstaffs Case.

9. Tythe shall not be paid for the Grass, or feeding on Fallow ground, though the same lie two or three years, adjudged Patch, 7 Car. in C. B.

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How TYTHES are to be paid.

**A**l tythes are to be yielded and paid according to the usage and custom of the place to which

where they grow due,  
 Stat. 27 H. 8. cap. 20.  
 37 H. 8. cap. 7. And for  
 predial tythes (that is,  
 Wood, Corn, Grain,  
 Hay, Fruit, and the like)  
 the tenth part is to be  
 set forth in the place  
 where they grow, be-  
 fore the owner take a-  
 way his nine parts  
 thereof, Stat. 2 Edw. 6.  
 cap. 13.

When the Parson-  
 ner hath set out his  
 tythes, he is not bound  
 to give the Parson no-  
 tice of it, but the Par-  
 son ought to attend  
 and take notice of it  
 himself; adjudged Trin.

15. Jac. C. B. Spencers  
Case. No 19.

After Tythes so set  
forth, if the Owner of  
the Corn withdraw or  
carry away the same,  
he is liable to be sued  
in the Spiritual  
Court, where he shall  
forfeit double the va-  
lue of such Tythes,  
besides costs and dama-  
ges, 2 Edw. 5. cap. 13.  
But if a stranger (that  
is, some body besides  
the owner) come pri-  
vately, and carry it a-  
way, the Parson may  
bring his Action a-  
gainst such stranger,  
but can do nothing to  
the

the owner, for he is not bound to watch his Tythes for him. Mic.

1 Car. B. R. Stileman and Chaners Case, Latch. 8.

Where Tythes are thus set out, the Parson hath liberty for a convenient time to come and carry them away; and what time shall be esteemed a convenient time, must be tryed by a Jury, and if he do not take them away in such time, you may bring an Action against him, and he shall then in judgement of Law be esteemed a Trespasser, ab initio

F 3      from

from the beginning, Re-  
 solv. Hill 22 Jac. in B. R.  
 312. Mountford and Sid-  
 ley's Case, Bolt. 3d part,  
 336, 337. See Trin. 21  
 Jac. B. R. Wiseman and  
 Denhams Case, Godbolt  
 319. Who was sued for  
 not accepting his tyths  
 of Cheese, but leaving  
 them in his Parishio-  
 vers house to his annoy-  
 ance and damage.

Where

**Where TYTHES are  
to be recovered.**

Note, That formerly tythes (being a matter purely spiritual) were to be sued for only in the Spiritual Courts, nor ought they indeed to be sued for any where else at this day, as is undeniably proved by Ridley in his beeto of the Civil and Ecclesiastical Law, from pag. 208. to 228. But the contrary is, and hath long time been used: For first,  
F 4. they

they will sue you for the treble value of your predial tythes ( if you do not set them out ) upon the Statute of 2 Ed. 6. cap. 13. to which your best Plea will be, that you owe them no tythes at all, and so put them to prove that first. Secondly it is their common practice to pretend themselves Debtors to the King, and sue in the Exchequer by English Bill, whereunto you must put in your Answer, which if it be well drawn, may puzzle them, and make them let their suit quite fall, or howe-  
 ver

ever it will be a long time before they can bring it on there to a Decree. Or, thirdly, They may (if they will sue you in the Spiritual Court, and there your best way is to plead either some Prescription, or else that the Tythes he Demands were not in that Parish, and so get a Prohibition, for they ought not then to proceed any further there.

Note, That tythes are not alwayes to be paid in kind, that is to say, the tenth part precisely; for in most pa-

¶ 5      rishes

tithes there is a parti-  
 cular Modus, Custom,  
 Prescription, or man-  
 ner of tithing, or some  
 certain sum of money  
 is to be paid in lieu  
 of tithes, &c. And this,  
 though less than a  
 tenth part, is good  
 and binding: And  
 therefore when ever  
 you are sued for tithes  
 in kind, if you plead a  
 particular custom, and  
 prove it, you will over-  
 throw the Parson or  
 Vicar. But note you  
 must prove this custom  
 by some persons, that  
 hold nothing in that  
 Parish where you al-  
 ledge

ledge the custom to be,  
otherwise it will not  
be good, for people of  
the same Parish will be  
presumed to swear for  
themselves.

They may sue you in  
the Spiritual Court  
for such a customary  
Rate, as well as for  
tythes in kind, but then  
if you deny there is a-  
ny custom, or alledge  
that there is some other  
custom or manner of  
tything than that in  
the Libel, they can pro-  
ceed no further, for  
they cannot try matter  
of Prescription there:  
And if they do proceed,

a.

a Prohibition lies,  
 Mich. 2. Car. B. R. Clerk  
 and Prowse Case, Latch.  
 210. And if you being  
 sued there for Tythes  
 in kind, plead a Modus  
 or Prescription, and if  
 they will not allow or  
 accept of such your  
 Plea, a Prohibition  
 lies.

Note, That tythes  
 will not pass without  
 Deed, Pasch. 19. Jac. in B.  
 R. Bothe and Cromptons  
 Case, Crook. 2. par. 613.  
 Mich. 7. Jac. C. B. Paw-  
 lings Case. And there-  
 fore if you agree with  
 your Parson and Vicar  
 to be Discharged of all  
 your

your tythes During the  
time he shall have the  
place, or the like, be  
sure you have it under  
hand and seal for other-  
wise it will not be good.

Brief Instructions for  
Church VVardens  
and Sidemen to  
observe in all Epi-  
scopal or Arch. Dia-  
conical Visitations.

**V**Vhen ever  
you are ci-  
ted or summoned to ap-  
pear at any Visitati-  
ons,

ong be sure to appear there so shall you not be excommunicated for a contempt.

No Bishop, Arch-Deacon, or other Ecclesiastical person ought to keep any Visitation, unless he hath Commission or Patent from his Majesty under his Great Seal to do it; and that as his Majesties Visitation only, and in his Name and Right alone, as appears by 26 H. 8. c. 1. 37. H. 8. c. 17. 1 Edw. 6. c. 2. 1 Eliz. c. 1. and 8 Eliz. c. 1. And this Commission ought to be read publickly.

likely before the Visitation, like Judges Commissions before the Assizes, that so people may be assured they have Authority from his Majesty.

wherefore at any Visitation, the first thing you are to do, (and that in point of Loyalty to his Majesty (by virtue of the Oath of Supremacy prescribed for this very end) is to demand of the Visitor, What Patent or Commission he hath from the King under his Broad-Seal, to keep a Visitation: If

1 Eliz. 1.

he have any, then Demand the Register to read it openly, as the Judges Patents are read at the Assizes; but if he cannot produce such Patent or Writ not in his Majesties Name and Right, and by his Royal Authority, than you ought all presently to protest against his proceedings, as contrary to his Majesties Lawes and Prerogative and so Depart home without more ado.

If they tender you any Articles to present on, Demand, Whether those

those Articles were made by the whole Convocation, by the Kings License, ratified by Parliament, and confirmed by the King himself under His Broad Seal: If they cannot make it appear to you that they were, you may bid them keep them for waste paper: For all Articles and Canons made by their own Authority, and printed in their own Names, are directly contrary to the Statutes of 25 H. 8. cap. 19. and 21 27 H. 8. cap. 25. 3. H. 8. c. 26. 37 H. 8. cap.

cap. 17. 1 Eliz. cap. 1. & 2 Eliz. cap. 13. but most expressly against their own twelfth Canon, where they say, Who-soever shall make any Rules, Orders or Constitutions in Causes Ecclesiastical, without the Kings Authority, and all those that shall submit to the same, let them be excommunicated ipso facto.

If they tender you any Oath, see for that in the before-going Chapter, which treats of Oathes. One note here, That the high

High Commission Court  
 was abolished absolutely by the Statute  
 of 17 Caroli 1. And  
 though that last mentioned Statute of Caroli, be repealed by a  
 Statute made in the  
 thirteenth year of His  
 now Majesty, yet this  
 very last Statute En-  
 acts, That that Clause  
 of 4 Eliz. on which the  
 high Commission Court  
 was grounded, should  
 stand and continue Re-  
 pealed.

And further the said  
 Act of the thirtieth of  
 the now King Enacts,  
 That it shall not be  
 law:

lawful for any Ecclesiastick Judge or Officer, to tender to any person whatsoever, Oath Ex Officio, or any other Oath when by such person may be charged to confess, accuse or purge themselves of any criminal matter or thing, whereby they may become liable to any censure or punishment,

Lastly if they Demand any Fees of you, Demand, whether any Statute or Patent from the King or his Ancestors, authorize or

able them to take such  
fees : If so, let them  
produce them, and you  
will pay what they al-  
low them to take. If  
not, then nothing is due.

Vivat Rex, floreat Lex,  
Crescat Pax, vigeat Grex.

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FINIS.